1863

The Case of Johnson v. Carpenter et als.

Minnesota Supreme Court

STATE OF MINNESOTA.

IN SUPREME COURT,

JULY TERM, 1863.

THE CASE OF

Johnson vs. Carpenter Et. Als.,

In Full, including the Opinion of the Supreme Court reversing Judge Vanderburgh, of the District Court, and also the Reversed Opinion and Decision of the Judge, in which he utterly "Extinguishes the Farthing Candle of the Supreme Court."

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SEE NOTE OF EXPLANATION ON THE THIRD PAGE.

NOTE OF EXPLANATION.

The Supreme Court of Minnesota in the case of *Johnson vs. Carpenter et. als.*, reversed the decision of Judge CHARLES E. VANDERBURGH of the Fourth District. Judge VANDERBURGH is very greatly incensed at the reversal, and claims that the Supreme Court have made a most ridiculous decision in the case, and themselves supremely ridiculous thereby. That he devoted more time and study, and careful attention to, and intense investigation of the legal questions involved in the case, than upon any other two cases he ever had in his life, either as counsel or Court. That he wrote an opinion, in the first instance, in favor of the Plaintiff, but that upon consultation with, and by direction of "FRANK," (the Amicus Curiæ who *dictates the decisions and opinions in all cases, not excepting his own*) he withdrew that opinion and substituted the one reversed, which "FRANK" still assures him is right,—and that THEREFORE he KNOWS he is right—that he CANNOT be mistaken—and that his view of the case, as he very positively—not to say pompously—asserts in his opinion, in his own choice, characteristic, and lofty sounding vernacular "*has passed into and become Elementary Law. See last Edition of Hilliard on Mortgages, page—.*"

Would it not be reasonably supposed, that a person of ordinary intelligence would feel deeply humiliated, to acknowledge the spending of so much time and intense study upon the subject, and even going so far as to actually draw his opinion in favor of the Plaintiff, and yet in the very next breath pompously claim, that the law is so simple, and so plainly and perfectly settled in favor of the Defendants as to have actually "*passed into and become elementary law ?*"

Is it at all compatible with ordinary intelligence, or even respectable attainments, to have spent so much time and study to discover a single point, which had already been so fully adjudicated and established, as to have "*passed into and become elementary law ?*"

And then look at the citation of authority upon which is based the assertion or opinion so broadly, positively, and pedantically enunciated, viz: "*Last edition of Hilliard on Mortgages, page—*"*!!!*

There are numerous authorities upon the subject exactly in point, and in which the subject is discussed *in extenso ;* yet notwithstanding the Judge claims to have spent such a vast amount of time in study-

ing and investigating the case, *he* did not know at the time of writing the reversed opinion, and had *never heard* of the *existence* of but *one single, solitary case*, and *that* amounting to next to nothing—being simply a direction in an *exparte* matter of an obscure Michigan Chancellor to a Master in Chancery, upon the spur of the moment, and *comprising, all told, less than five lines.* And even this *waif*, is only dimly and indistinctly known *to him* as existing *somewhere* in "*Hilliard on Mortgages,*" an extensive work of two large volumes of many hundreds of pages each; but *whereabouts* in the work it may be found, in which volume, whether in the first or second, he evidently has no more idea than "the Man in the Moon," only that it is in the "*last edition, page—.*" How deeply the law on the subject *must* be engraven on his mind! No wonder he is so positive he is correct!

And the learned Judge claims that his own decision in the case is the correct law, and that his own opinion is infinitely abler than that of the Supreme Court, and "*entirely extinguishes their farthing candle.*"

Notwithstanding its many striking excellencies, flashing like glittering diamonds from every part of his opinion, the great crowning glories of it will be found to be in its *Websterian strength and coherence*, and its *great transparent consistency.* And it is confidently believed that it will not prove a subject of very grave doubt, even to tyros in law, as to *who* is *extinguished* in the case, nor *who* is placed *completely hors de combat* by the encounter.

The following pages contain the case of *Johnson vs. Carpenter et. als.* in full, including the opinion of the Supreme Court, and also that famous opinion of Judge VANDERBULGH, *verbatim*, by which he claims to have utterly annihilated the Supreme Court. It has been published by the voluntary contributions of the members of the Bar who are the ardent admirers, and warm personal friends of the Judge,—embracing very nearly the whole Bar, in order to give him the benefit of having his opinion—his extinguisher—published in connection with theirs, and thereby, *to set him right upon the Record.* And this case is but the forerunner of many others of the celebrated decisions made by the Judge, now in course of preparation for publication, to be also published by the cheerful contributions of the *admiring* and *grateful* members of the Bar, by which the *astonishing impartiality, sterling integrity*, and *absolute incorruptibility* (*!!!*) of the Judge will be as conclusively demonstrated, as his sublime abilities are by this case.

As the Pius Enæas, the wandering scapegrace of the Trojans, said to Queen Dido in regard to his Wooden Horse story as illustrating the wiles of the Greeks, so may we with equal truth and propriety remark of the opinions of the learned Judge, "*Ab uno disce omnes.*"

MARTIN JOHNSON, APPELLANT,
vs.
KATE G. CARPENTER, ET. ALS. RESPONDENT.

STATE OF MINNESOTA. In Supreme Court.

This action was brought to restrain the foreclosure of, and to cancel a mortgage on certain lands in Hennepin County, made December 17, 1855, by Defendant John McKenzie to one John Osborne, and duly recorded February 19, 1856: the Complaint alleging that it was given to secure the payment of a promissory note for $207, payable in three years from date. That said Osborne, March 17, 1858, (before the maturity of said note) duly assigned said note and mortgage to one W. W. Eastman; but said assignment was not recorded till May 23, 1861. That upon that day said Eastman duly assigned said note and mortgage to the Defendant, Kate G. Carpenter, who upon the same day caused the said assignment to herself to be recorded. That previous to the said assignment of said mortgage and note by Osborne to Eastman, the said Mortgagor, McKenzie, fully paid the amount due on said note and mortgage to said Osborne, the Mortgagee, and thereby extinguished the said mortgage, and that the Fact of such payment was known to Eastman at the time of such assignment to him.

Plaintiff then set out his own title to said premises under a second mortgage, in substance as follows: That on June 4, 1856, said McKenzie executed to said Osborne a second mortgage on same premises to secure the payment of $370, in one year from that time. That on the 11th day of June, 1859, the Plaintiff, at the request of the said Osborne, relying upon the statements of said Osborne and said Mortgagor, McKenzie, that said first mortgage was fully paid, and upon the absence of any recorded assignment of either of said mortgages, and after the most diligent and careful enquiry failing to learn any fact or circumstance inconsistent with such statement, and with the ownership of said second mortgage by said Osborne, advanced and loaned in actual cash to said Osborne $219,50 and took an assignment from him of said second mortgage and note, and of all said Osborne's interest, estate and claim in and to said mortgaged premises, as collateral security for the repayment of said $219,50.

The Defendants answered, denying that said Eastman at the time when he took the assignment of said first mortgage and note had any notice that the same had been paid, and denying that the same had

been paid, and averring that he took an assignment of said mortgage, and a transfer of the note secured thereby by indorsement and delivery from said Osborne, for value, in good faith and without any notice of payment. And alleging further that one, Isaac Crowe, was the owner of said second mortgage, at the time Plaintiff took the assignment of it, and so continued to be and still was at the time of the commencement of this action.

The Reply put in issue the averment in the answer of the ownership by Crowe of the second mortgage.

The Evidence upon the issues involved having been duly submitted to a Jury, they found the following Special Verdict:

"The Jury in the case of Martin Johnson vs. Kate G. Carpenter, et. als. find,

1st. That John McKenzie paid to John Osborne the amount of the 1st note and mortgage mentioned in the Complaint and purporting to be assigned to W. W. Eastman, March 17, 1858, in good faith and without any knowledge of any assignment or sale thereof by said Osborne the mortgagee. They have no evidence of the time at which said payment was made.

2nd, They find that Eastman did not have notice of said payment at the time of the alleged assignment to him.

3d, That said mortgage first given was made to secure a negotiable promissory note, payable three years after date, with interest at 30 per cent. per annum.

4th, That said W. W. Eastman assigned the same to Defendant, Kate G. Carpenter, in good faith for a valuable consideration.

5th, That Isaac Crowe held the said second mortgage claimed by Plaintiff at and after the time this action was commenced, as collateral security. That the Plaintiff has since obtained possession thereof by satisfactory consideration to said Crowe.

6th, That the said note and mortgage were not present and delivered to the said Plaintiff at the time of the purchase thereof. That the Plaintiff did make diligence to ascertain who owned the same by examining the records of the office of Register of Deeds.

Upon this Special Verdict each party, Plaintiff and Defendants moved for Judgment. And Judge Vanderburgh after incubating the subject for nearly three months, finally decided in favor of the Defendants in the following exceedingly able, learned, and *transparently consistent* opinion:

JUDGMENT UPON SPECIAL VERDICT.

This cause was tried at the late November Term of this Court, upon

the issues of fact before a jury who returned a special verdict, upon which counsel for the respective parties move for judgment.

The record presented for our consideration is the pleadings in the cause and the special verdict of the Jury on file. The Jury find that John McKenzie paid to John Osborne, the Mortgagee, the amount of the first note and mortgage mentioned in the complaint (being the note and mortgage in question) in good faith and without any knowledge of any assignment or sale thereof by said Osborne, but the Jury say they have no evidence of the time of such payment.

It also appears from the record, taking the facts which stand admitted in the pleadings in connection with the finding of the Jury, that this note was endorsed and said mortgage assigned to said W. W. Eastman, before the same became due in good faith, for value. That the same was a negotiable promissory note and was delivered to him with said mortgage at the time of said endorsement, and they remained in his possession until May 21st, 1861, when he in good faith transferred the same for value to the Defendant, Kate G. Carpenter, and that said Eastman took the same without notice of the said payment.

Upon these facts the first question that presents itself is how is the said Eastman or his assignee the Defendant, Carpenter, affected by such evidence of payment. The allegation in the complaint is that the payment was made prior to the assignment to Eastman, but there being no evidence as to the time of payment we think the legal presumption must be that the payment was made to Osborne the mortgagee at the maturity of the mortgage.

Vol. 1. Philips evidence by Edwards, (Ed. of 1859) page 671, Section 10.

In any event, therefore, the payment must be assumed to have been made subsequent to the transfer to Eastman. Could then the defendant, John McKenzie, have set up such payment under the facts in this case to defeat the foreclosure of the mortgage in question? He could not certainly have urged such payment, as a defence to a personal action against him upon the note, for that being negotiable and endorsed before due, would have passed to Mrs. Carpenter, discharged of all equities claimed to exist between the original parties.

The allegation in the complaint, folio 3, is that the mortgage in question was executed to secure the sum of $207, according to *the terms of a certain promissory note*, of the same date.

Now upon the transfer of the note the mortgage security passes with it as a mere incident to the debt. It goes with the note not as a negotiable instrument, because the mortgage cannot be such, nor can it partake of the privileges of negotiable paper, but because it is

inseparable from the debt, and is assigned with it. It becomes important then to discuss what defences can the Mortgagor set up against the mortgage while he admits himself liable personally to the holder of the note—to a judgment for the amount thereof. Clearly to my mind, he must be confined to defences appertaining solely to the mortgage as an instrument. He can as against all parties allege defects (possibly fraud) in the execution or record thereof, or a special contract of release of the mortgage premises having priority or record. So also the rights and lien of the Assignee of the mortgage, whether given to secure a negotiable note or not, would be subordinated to the lien of 3d persons, claiming in good faith under a subsequent assignment or other instrument affecting the mortgage having priority of record. This is necessary to give effect to the recording acts. 2 Barb. Chy., R 82; 1 Wend. 478, 10 Paige, 409; 11 Paige, 28. But it is entirely a different question where the plea for discharge of the mortgage is the alleged payment of the mortgage *debt*. Can the Mortgagor claim to be discharged from liability on the mortgage by virtue of a *payment*, which leaves the mortgage *debt* still *unpaid*, and the Mortgagor liable to a personal action therefor? We think not, and believe that such is not the doctrine of the authorities bearing upon the subject. There is no authority that holds that where a second payment of a debt can be enforced by law, the first payment was good to discharge the debt, and if the payment is not good to discharge the debt how can it be claimed that the mortgage is discharged by such payment? No, in such case the first payment would be recovered back as paid to the party through mistake, and wrongfully received. Without reference to the rights of an Assignee who is also indorsee of a negotiable note accompanying it on the one hand, or rights and liens which may attach by virtue of the recording acts on the other hand, the *general rule* is undoubtedly as insisted by the Plaintiff herein, and laid down in all the books, upon the subject, that the assignee of the mortgage takes subject to all equities existing between the original parties, and subject to the state of accounts between the parties and all payments to the Mortgagee until actual notice of the assignment. James vs. Morey, 2 Cowen, 246; 3 leading cases in equity, 645. But this is a doctrine not peculiar to mortgages, but is the rule in reference to the transfer of all choses in action not including negotiable paper. 2 John. Chy., 443; 3 leading cases in equity, 373. In such case the assignee in order to perfect his assignment and guard against subsequent payment, must give notice of the assignment. And our statute, section 28, page 400 of Public Statutes, is a mere recognition of the rule already existing in reference to choses in action. But this

rule has of course no application to transfers of negotiable paper under the law of merchants, nor to any other exceptional cases to which it would be manifestly inapplicable, such for example as if the debtor or obligor should as a part of his contract expressly waive notice of any assignment which the obligee might make, taking the burden on himself of finding out the true owner at the time of payment. So the maker of a negotiable note takes upon himself the responsibility of finding out and paying the true owner when he signs an instrument of such peculiar character.

This distinction is well stated by Denio, Judge, in 18 N. Y. 55. "There is a marked distinction between negotiable paper and other contracts in that the former is issued for the purpose of circulation. The promise is in terms to the endorsee or any person who may become the bearer as well as to the payee, and when the amount is claimed of the maker by a person who makes title according to the terms of the paper, he does not strictly assert a derivation title, but he seeks to enforce a contract running to himself. In other contracts it is supposed that the parties to the bargain are those between whom it will be finally adjusted, and the assignment is an exceptional thing, allowed by law upon equitable reasons, but not originally contemplated by the parties."

It is a general and well settled rule of law that the maker must be careful to ascertain the true proprietor of the note before he makes payment, and if he pays the wrong person he does so at his peril. It is no payment of the debt, and can not be treated as such; and his only remedy is to recover back his money. Story on Promissory Notes, Sec. 375; and although (vid. Sec. 381) possession of the note by a person claiming to be authorized to receive the money is prima facie sufficient to warrant the maker if acting in good faith to pay such person, yet in the case at bar the maker McKenzie did not pay to a person having the note even, for it appears that the same had previously been delivered to said Eastman.

It may be urged by way of analogy to this case, that tender of the mortgage debt operates to discharge the lien of the mortgage whether accepted or not or whether kept good or not, and the debt will still remain uncancelled. 26 Wend., 541.

It is a sufficient answer to this, however, to say that a plea of tender as well as of payment must show that it is made to the right person.

Therefore we hold that the mortgage debt in this case remains unpaid, and the mortgage given to secure the same is still undischarged and in force. And though the precise point in this case seems rarely to have come up for adjudication, yet we are not entirely with-

out the light of authority upon the subject. In Reeves vs. Scully, Walker's Chy., R. (Mich.) page —. The bill was filed to foreclose a mortgage for $900, payable in one year accompanied by a promissory note payable to the mortgagee or order. The mortgagee endorsed the note and assigned the mortgage to Reeves before the note became due.

The Chancellor directed the decree to be entered for the amount of the note and mortgage, saying that Reeves as bona fide endorsee of the note was not effected by the equities existing between the Mortgagee and Mortgagor, but that it would have been otherwise if a bond instead of a note had been given with the mortgage. And this has passed into and become elementary law. See Hilliard on Mortgages last edition, page ——.

The other point made on the argument it is hardly necessary to examine as the view we have taken above necessarily disposes of the case. It is proper to observe, however, that under our recording act, Pub. Stat. page 404, Sec. 1 and Sec. 10, assignments of mortgages are authorized to be recorded, and that as between assignees of the same mortgage, the assignment first recorded without notice holds, and that the fact of the assignment to the plaintiff being placed on record together with the fact standing admitted upon the pleadings and the finding of the jury in relation to plaintiff's dilligence, are sufficient to give him the preference over Isaac Crowe who held the mortgage at the time of the commencement of this action. It is true the jury find that the note and mortgage were not present and delivered to plaintiff at the time of his purchase, but it does not appear (as admitted) on the record that Osborne did not then have the note and mortgage in his possession.

Judgment is ordered for the defendants who have appeared herein, and the injunction is dissolved.

CHAS. E. VANDERBURGH, Judge.

From which decision the plaitiff appeals to the Supreme Court.

IN SUPREME COURT.

POINTS AND AUTHORITIES OF APPELLANT. L. M. STEWART, ATTORNEY FOR PLAINTIFF, APPELLANT.

The special verdict of the Jury in this case having found that the mortgage under which the Defendant, Kate G. Carpenter, claims, was paid in full by the mortgagor therein to the mortgagee in good faith and without any notice of any assignment thereof by the mortgagee, the decision of the Court below, holding that the said mortgage, is still a subsisting and paramount lien on the premises in dispute herein, as against the claim and lien of this Plaintiff, is based upon the *assumptions:*

1st. That where a mortgage is given as security for a debt, in conjunction with a *negotiable* instrument, e. g. to pay $207 in three years from the date of these presents, "according to the conditions of a negotiable promissory note, &c.," the mortgage is *not a chose in action*, but being an "*incident*" of the note, passes with the sale and delivery of the note, in the same manner as the note and at the same time, and with *all the privileges and immunities of the note*, and divested of all equities between the original parties, to the same extent as the note precisely, *and in essence is a negotiable instrument.* And that the *contract evidencing* the debt which the mortgage is given to secure, determines, by being negotiable or non-negotiable, whether the collateral security shall pass free from, or subject to the equities of the original parties.

2d. That in such a case the mortgage is given to secure the *note* which *evidences* the debt and *not* the *debt itself*, and is "*inseparable*" from the *note.*

3d. That the broad grounds taken in the decisions in New York and almost all the other States of the Union, that a mortgage is a *chose in action* and in its transfers and assignments is governed by the law applicable to the assignments of choses in action, without making any distinction or exception in regard to the cases where mortgages were given in connection with *negotiable notes* to secure debts, were so taken

because negotiable notes were not known in those States, as the personal contracts in connection with mortgages to secure debts.

4th. That where a mortgage chances to be given conjointly with a *negotiable promissory note*, to secure an indebtedness, the mortgagor who is ready and desirous to redeem his lands, cannot rely on the records, nor on the fact that no notice of any assignment has been given him, nor on his own good faith and the entire absence of every circumstance calculated to give him constructive notice of any assignment, in making a *tender* or *payment* of the money to discharge the mortgage lien, but he must *at his peril* keep run of *every transfer of the note*, whether the mortgage accompanies it or not—whether the mortgage is assigned with it or not, and whether the assignments are recorded or not, and *must tender* or *pay* the money to the *very person who actually owns the note, irrespective of, and without reference to, what the Records may show, or the notices he may have received of actual assignments of the mortgage.*

5th. That the Recording Acts and Registry Laws are not applicable to Mortgages nor the Assignments of Mortgages, and that Section 28 of Chapter 35 of the Collated Statutes of Minnesota, and the direct and unmistakable implication therein contained are *utter nullities* and of no force in this State, where negotiable promissory notes are almost *exclusively* used in connection with mortgages to secure debts.

All which assumptions and conclusions by Judge Vanderburgh of the lower Court are very grave errors in law. And his decision should have been, that the mortgage under which the said Defendant Kate G. Carpenter claims, was extinguished by the payment of the amount thereof by the mortgagor to the mortgagee without any notice or suspicion of any assignment thereof by the mortgagee; and that if it had not been paid or tendered at all it would be a subservient lien to the lien of this Plaintiff.

Because 1st. A mortgage is not and *cannot* be *negotiable. It has not a single attribute* or *peculiarity* of *negotiable paper.* To be *negotiable*, an instrument "*must* be a *simple, general, mere* PROMISE to pay." 1 American Lead. Cas., 305. "The *liability* to pay *must* be *personal and absolute*, and the instrument must be payable *at all events*, and at some time which *must certainly come*, 1 Am. Lead. Cas., 309." "It must be payable in *money only*, and *cannot* be for the payment of money *and the performance of some other acts.*" 1 Am. Lead. Cas., 315. Austin v. Barns, 16 Barb., 643. Wallace v. Dyson, 1 Spear, (S. C.) R., 127. Jameson v. Farr, 1 Haywood, 182." "It *must contain* words of negotiability such as *'or order,' 'or bearer,'* 1 Am. Lead. Cas., 317. Backus v. Danfurth, 10 Conn., 298. Parker v. Riddle, 11 Ohio, 102.

3 Harrington, 385. "1 Kelley, 75. 1 Kelley, 236." "An instrument *under seal* though *in the form of a negotiable promissory note is not negotiable,*" 1 Am. Lead. Cas., 323. Foster v. Floyd, 4, McCord, 159. Burckhead v. Brown, 5, Hill, 646. Helper v. Alden, Cutter & Hall, 3 Minn., 335. Story on Promissory Notes, § 55. Clark v. Farmers Manuf. Co., 15 Wend, 256. Warren v. Lynch, 5, John. 239. Glyn v. Baker, 13, East, 509. Georgier v. Melville, 3, Bar. & Cresw, 45. Story on Bills, § 61. Covell v. Tradesmans Bank, 1 Paige, 131.

A mortgage then is *not negotiable*, and so holds Judge Vanderburgh in his *premises*. He says: "It (the mortgage) goes with the note, *not as a negotiable instrument, because the mortgage cannot be such, nor can it partake of the privileges of negotiable paper,*" and again, "The assignee of the mortgage takes subject to *all* equities existing between the original parties, and subject to the state of accounts between the parties, and *all payment* to the mortgagee until actual notice of the assignment. But this is a doctrine not peculiar to mortgages, but is the rule in reference to the transfer of *all choses in action, not including* NEGOTIABLE PAPER."

And yet, notwithstanding the mortgage under the assignment of which the Defendant, Kate G. Carpenter, claims was found by the special verdict of the Jury to have been paid by the mortgagor to the mortgagee in good faith and without any notice of the assignment; and notwithstanding the lower Court holds that upon the assignment "of *all* choses in action *not including negotiable paper,*" "the assignee takes *subject to all payments to the mortgagee until actual notice of the assignment,*" and that "a mortgage *cannot be negotiable, nor can it partake of the privileges of negotiable paper,*" he comes to the *conclusion* that the mortgage *did, somehow, "partake of the privileges of negotiable paper,"* and that the assignee *did not* "take subject to all payments to the mortgagee until actual notice of the assignment," and that the mortgage is still a continuing, unextinguished lien. *Such a conclusion* from *such premises* is mildly characterized as absurd. For *all* choses in action are either *negotiable* or *non-negotiable*, and when one is ADMITTED to be "neither NEGOTIABLE NOR to PARTAKE of THE PRIVILEGES of negotiable paper," it would be a little curious to know in WHAT WAY it succeeds in running the blockade of PAYMENT and the EQUITIES BETWEEN THE ORIGINAL PARTIES.

The position of the Court is that the mortgage is but an "*incident*" of the *personal obligation* referred to in the mortgage for the terms of the indebtedness, and that the *character* or *kind* of this *personal obligation* determines whether the mortgage and all other collateral security shall pass free from or subject to the equities of the original par-

ties; and that if a mortgage is given to secure an indebtedness according to the terms of a negotiable instrument, a note for instance, that then the mortgage in all cases passes free to the same extent as the note; and if given to secure an indebtedness according to the terms of a non-negotiable instrument, a bond for instance, that then all equities and payments between the original parties are let in to the same extent as on the bond, i. e., all the equities. And *if* this position is *correct* it certainly has very much the *appearance* as though in many cases mortgages *do* "*partake of the privileges of negotiable paper.*" But let us examine this position. Suppose A gives his negotiable note to C for $500, for value, and together with B, to secure the note executes a bond to C, for the payment of the note. Subsequently, but before the maturity of the note C endorses the note and assigns the bond to D, who neglects to give A or B any notice of the assignment to him, and when the note comes due, A, having in the meantime become insolvent, B calls upon C, and without notice or suspicion of any assignment by C, pays him the amount due by the terms of the Bond, and demands that it be delivered up to him to be cancelled, when C, having already got possession of the money, informs him that he has assigned the note and Bond to D. Does any one doubt that B, having, without knowledge or suspicion of any assignment by C, paid to him, the very person he *covenanted* to pay, the amount due on the Bond, thereby entirely extinguished the *Bond*, though the *note* was still unpaid against A?

Again suppose A, to secure the payment of money, gives B his negotiable note on time and his bond as collateral security therefor. Before the maturity of the note, C buys the note of B, and takes an assignment of the note and Bond for value, and in good faith, but does not give A any notice of his claim under the assignment, and A, at the time of the maturity of the note, without notice of the assignment, pays the amount of the note and Bond to B. Now is there any reasonable doubt, that though by the law of *negotiable* paper A was bound at his peril to pay only the *actual* owner of the *note*, and therefore the *note* was not satisfied by such payment, that the *Bond* was extinguished thereby, because by the laws of *choses in action* A was *entitled*, not having had any *notice* of any *assignment* of the Bond to *presume* (11 Paige 38) that B still held and owned it, and because whether a chose in action is taken up or not, when paid, it can *never* be subsequently assigned, even for value and to a party without notice, so as to be of any avail against the maker of the instrument, because the previous payment *extinguishes* it, into whose hands soever the

same may come, and the maker is under no obligation to be careful to take it up when he pays it.

Suppose a *Judgment Lien* assigned as collateral security for the payment of a *negotiable note*, would it pass before the maturity of the note, divested of all equities to the same extent as the note? It would be just as much as the mortgage lien an "*incident*" of the note. It would not pass so, if not put as collateral to the note. Brisbin v. Newhall, 5 Minn., 273.

Suppose a mortgage given to secure $1000. That $500 of it is evidenced by a negotiable note and $500 by a bond, both payable at the same time and upon the same terms precisely and that the mortgage is conditioned to pay "*one thousand dollars*, according to the conditions of a certain bond and note of even date herewith." Now does the mortgage which is an "*incident*" of the debt evidenced partly by the bond and partly by the note, pass subject to the equities between the original parties, or free from these previous to the maturity of the note, or does *one undivided half* of it pass free from, and the other subject to the equities ?

Still again, suppose A, owning the Bond and mortgage of B, borrows money of C, and gives his own note on time to C, and as collateral security therefor, assigns to C the Bond and mortgage of B; C notifies B of the assignment, and that they are assigned as collateral security for the note of A, and that the note is negotiable and on time. C subsequently sells and endorses the note before it is due to D, and in good faith and for value, and duly assigns the Bond and mortgage securing the same to D. D neglects to record his assignment, and also to give either A or B notice of the assignment. B being desirous of clearing his land of the lien of the mortgage, pays the amount of the Bond and mortgage to C, without notice or suspicion of the assignment. Now if the position of Judge Vanderburgh is correct, the Bond and mortgage being assigned as collateral security for a negotiable note transferred before its maturity, to a bona fide holder for value, pass as an "*incident*" of the note. And though by the law regulating *choses in action*, (which the bond and mortgage were till put as collateral security for a *negotiable* instrument) the payment would have extinguished the bond and mortgage, yet having become an "*incident*" to a *negotiable* note changes all this, and the obligor is *bound at his peril*, whether any assignment has been recorded or not and whether he has had any notice of assignment or not, to pay the person who is the *real owner of the* NOTE, or else he will not have succeeded in removing the lien from his land. For the moment the *heavy* and *lifeless chose in action* is put as collateral security for a

negotiable note, that moment it is thereby *galvanized* into all the *active vitality* of *negotiability*, and becomes endowed with all the *immunities* and *privileges* peculiar alone to that class of securities.

Suppose A mortgages land to B, to secure the payment of a negotiable note for $1000. Subsequently A having an opportunity to sell one half of the mortgaged land to C, together with C, pays B $500 towards the debt secured by the mortgage, before the maturity of the note, and B, in consideration thereof duly releases that half of the premises bought by C, from his mortgage by deed of Release. A and C immediately proceed to the office of Register of Deeds and have the same recorded; but while the same is being recorded, B sells, endorses, and transfers the note for full value to D, who buys the same in good faith and without any notice of any payment of any part of the debt or of the Release. Is there any doubt that the mortgage is discharged from that half of the premises released from the mortgage, though the *note* may be good in D's hands against A *personally* for the full amount. For the state of the *title* to C's and A's *land* is to be determined by the *Records in the office of the Register of Deeds*, within the County in which the land lies, and *not* by the *endorsements on the back of A's note.*

Suppose A mortgages land worth $3000 to B to secure the payment of A's note for $1000. That subsequently A deeds one-half of the mortgaged lands to C, the part still remaining in A's name being considerably more than enough to secure and pay the mortgage. That B, being at enmity with C., and thinking to injure him and to throw the whole of his mortgage on to C's part of the mortgaged premises, and in consideration of a horse, worth $50, received of A, releases the part still remaining in A's name and owned by him. A immediately has his release recorded, and deeds his half to D, who buys the same in good faith for value, relying upon the records. And while the release and the deed to D are being recorded, B sells, endorses, and transfers the note and assigns the mortgage to E, who buys the same in the course of business, for full value, before its maturity, and without any knowledge of the Release and the deed to D. Is the mortgage still good in E's hands for the full amount? the *note* is. But that the Release extinguished the *whole* mortgage, see Johnson v. Williams, 4 Min., 268. See also Jones v. Quinnipiack Bank, 29, Connecticut, 25.

Lastly, suppose A hires $100 of C, and gives his bond therefor, and as collateral security for the payment of the same, together with B, executes a negotiable promissory note to C for $500, payable in six months, the same time when the bond is made payable. C carries

the note to D, a banker, and sells, endorses, and transfers the note to him for full value, in the course of business, before the maturity of the note, without any notice that it was an "*incident*" of any non-negotiable instrument, nor of any infirmity in it, reducing it below its written terms and apparent value, nor of any equities whatever between the original parties. Now, notwithstanding it was a negotiable instrument or note, taken in the course of business, for full value, before its maturity, and without notice or suspicion of any equities between the original parties, reducing it below its apparent value, yet if the idea of Judge Vanderburgh is correct, and the character or kind of the principal instrument, evidencing the actual debt determines and decides in what manner and way the "incidents" and all collateral security shall pass, i. e., whether as negotiable or non-negotiable, then this note is only good in the hands of D, against A and B, to the extent of the $100 bond of A to C, and is subject to all the equities between the original parties; and thus at a single blow destroys the well settled law of commercial paper.

And the two positions are just about equally consonant with sound reason; that the negotiable principal instrument, *evidencing* the debt, should *vitalize* the *dead collateral*, and that the lifeless principal, the chose in action, evidencing the debt should *kill the live collateral*. See *Eaton v. Whiling*, 3 *Pick.*, 488, *and Young v. Miller*, 6, *Gray*, 153, *that a mortgage to secure negotiable notes is a* CHOSE IN ACTION. Aiken v. Kilburn, 27, Me., 266.

2d. Because a mortgage *is always*, as unqualifiedly laid down in all the books, "*undoubtedly a chose in action.*" 3 Leading Cases in Equity, 375; Bush v. Lathrop 22, N. Y., 535; Mickles v. Townsend 18, N. Y., 575; Van Rensellaer v. Stafford Hopkins, Ch., R., 569; 9 Cowen, 316; 2 Leading Cases in Equity, 81; Pouillon v. Martin, 1 Sanf., Ch., 569; Peabody v. Fenton, 3 Barb., Ch., 451; Sweet v. Van Wyck, 3 Barb., Ch., 647; Wiltshire v. Rabbits, 14, Simons R., 76; Andrew Newports Case, Skinner, 423; Conrad v. The Atlantic Ins. Co., 1 Peters, 386, 441; 1 Smiths Leading Cases, 662, 5th Am. Edit.; Clute v. Robinson, 2 John, 595; Niagara Bank v. Roosevelt, 9 Con., 409; Fitch v. Cotheal, 2 Sandf. Ch., 29; Hanley v. Carroll, 3 Sandf., Ch., 301; Reed v. Marble, 10 Paige, 409; Vanderkemp v. Skelton, 11 Paige, 38; N. Y. Life and Trust Co. v. Smith, 2 Barb., Ch., 82; Hogdon v. Naglee, 5 Watts & Serg., 217; McFarlane v. Griffith, 4 Wash. C. C. R., 585; Watkins v. Worthington, 2 Bland, Md., 509, Matthews v. Walwyn, 4 Vesey, 118; Williams v. Sorrell, 4 Vesey, 389; *Eaton v. Whiting*, 3 *Pick*, 488, *expressly deciding so in case of mortgage securing payment of two negotiable notes. Also in Young*

v. Miller, 6 Gray, 152; Smith v. Peoples Bank, 24 Me., 194; Aiken v. Kilburn, 27 Me., 266.

And "*Nothing is plainer than that an* ASSIGNEE OF A DEBT OR OTHER CHOSE IN ACTION *can take* ONLY *such interest as his assignee has to transfer and will be bound by* ALL EQUITIES *binding on the latter.* 3 *Leading Cases in Equity*, 369; *McDonald v. Kneeland*, 5 *Min.*, 362; *Bush v. Lathrop*, 22, *N. Y.*, 535; Davies v. Austin, 1 Vesey, Jun., 247; Norton v. Rose, 2 Wash., 233; Beebe v. Bank of New York, 1 John, 529; Brashear v. West, 7 Peters, 608; Livingston v. Stubbs, 4 John, Ch., 693; Livingston v. Dean, 2 John, Ch., 479; Jourdan v. Black, 2 Murphey, 30; McKennie v. Rutherford, 1 Dev. and Bat., 14; Oliver v. Lowrey, 2 Harrington, 46; Webster v. Wise, 1 Paige, 319; Gay v. Gay, 10 Paige, 369; Jeffries v. Evans, 6 B., Munroe, 119; Wood v. Perry, 1 Barb., 114; Ainstie v. Boynton, 2 Barb., Ch., 291; Frants v. Brown, 17 Serg. & Raw., 287; Andrews v. McKoy, 8 Alabama; 920; Ragsdale v. Hagg, 9 Grattan, 409; *Muir v. Schenk*, 3 *Hill*, 228; Minor v. Hoyt, 4 Hill, 193; Chamberlain v. Day, 3 Cow., 353; Chamberlain v. Gorham, 20 John., 144; Bank of Niagara v. McCracken, 18 John., 493.

And "*the assignment of a debt will not invalidate a payment made to the assignor*, UNLESS NOTICE HAS BEEN GIVEN TO THE DEBTOR, *for he is obviously* ENTITLED TO PROCEED IN ACCORDANCE WITH HIS ORIGINAL UNDERTAKING SO LONG AS HE IS IGNORANT THAT ANYTHING HAS OCCURRED TO VARY ITS OPERATION." 3 Leading Cases in Equity, 373; Reed v. Marble, 10 Paige, 409; Campbell v. Day, 16 Vermont, 358; Mangles v. Dixon, 18 Eng., L. and Eq., 82; Barney v. Douglass, 19 Vermont, 98; Vanderkemp v. Skelton, 11 Paige, 38; Ward v. Morrison, 25 Vermont, 593; Loomis v. Loomis, 26 Vermont, 201; Cladfield v. Cox, 1 Sneed, 330; Murdock v. Finney, 21 Missouri, 138; Woodbridge v. Perkins, 3 Day, 364; Judah v. Judd, 5 Day, 534; Bishop v. Halcomb 10 Conn., 444; Foster v. Mix, 20 Conn., 395; Adams v. Leavens, 20 Conn., 73; Hanley v. Carroll, 3 Sandf., Ch., 301; Muir v. Schenk, 3 Hill, 228; Foster v. Beals, 21 N. Y., 251–2.

3d. Because the mortgage is given to secure the *indebtedness evidenced by the note*, and *not* the *note itself;* and the mortgage and the note are *not* "*inseparable.*" 1 Hilliard on Real Property, Chap. 33, Sec. 28. Elliott v. Sleeper, 2 N. H., 525; Crosby v. Chase, 5 Shepley, 369; Davis v. Maynard, 9 Mass. 247: Williams v. Little, 12 N. H., 29; Pomeroy v. Rice, 16 Pick, 24; Watkins v. Hill, 8 Pick, 522; Dunham v. Dey, 15 John., 555; *Hill v. Beebe*, 3 *Kernan*, 562; *Tripp v. Vincent*, 3 *Barb. Ch.* 614; Grugeon v. Gerard, 4, Young & Coll., 119; Teed v. Caruthers, 2, Y. & Coll., Ch. 31; Morse v. Clayton, 13, Smeeds & Mar-

shall, 373; Burdett v. Clay, 8, B. Munroe, 287; Bank &c. v. Finch, 3, Barb, Ch., 293; Hadlock v. Bulfinch, 31, Me., 246; Buswell v. Davis, 10, N. H., 424; Euston v. Friday, 2 Rich., (S. C.) R., 427 n; Hardy v. Commercial &c., 10 B., Munroe, 98; Flanders v. Barstow, 8, Shepley, 357; Hugunin v. Starkweather, 5, Gilman, 492; McCormick v. Digley, 8, Blackf., 99; New Hampshire &c. v. Williard, 10, N. H., 210; 1 Hilliard on Mortgages, Chap. 17, Secs. 4 and 5; Gregory v. Thomas, 20 Wend., 17; Dunshee v. Parmlee, 19, Vermont, 172; McDonald v. McDonald 16, Vermont, 630; Bolles v. Channey 8, Conn. 389; Pond v. Clark 14, Conn., 334; Brinkerhoff v. Lansing 4, John. Ch., 65; Cullum v. Branch, 23, Alabama, 797; Farmers &c. v. Mutual &c., 3 Leigh, 69; Whittaker v. Dick, 5, How. (Miss.) 296; Lee v. Porter, 5, John. Ch., 268; Maryland &c. v. Wingert, 8, Gill, 170; Lawrence v. Lane, 4, Gilman, 354; Haynes v. Rogers, 6, Little, 229; Baldwin v. Norton, 2, Conn., 163; Bank &c. v. Tarleton, 23, Miss., 173; Thayer v. Mann, 19, Pick, 535; Michles v. Townsend, 18, N. Y., 577.

And the mortgage and the note, (or other personal obligation) are *each* of them *separate and distinct securities* for the same *debt*. Pomeroy v. Rice, 16, Pick, 24; Davis v. Maynard, 9, Mass., 247; Hale v. Rider, 5, Cush, 232; Slaughter v. Foust, 4, Blackf., 381; Hodgdon v. Naglee, 5. Watts and Serg., 217; 1 Hilliard on Mortgages, Chap 17, Sec. 16; Tripps v. Vincent, 3, Barb. Ch., 614; Ely v. Ely, 6, Gray, 441. And the mortgage is as *independent* of the *note* as the *note* is of the *mortgage*. Thus the note may be destroyed and another one taken in its place, and for a larger amount, and still the *mortgage* remains security for the *indebtedness*. Hill v. Beebe, 3, Kernan, 556; Dunham v. Day, 15, John., 555; and see the numerous cases cited under point 3d. So the *note* and the *indebtedness too* may be barred, and *practically extinguished* by the Statute of Limitations, yet the *mortgage lien* for the payment of the amount of the debt is not effected by such practical extinguishment of the personal claims on the note and indebtedness. Thayer v. Mann, 19, Pick, 535; Joy v. Adams, 26, Me., 333; Fisher v. Mossman, 11, Ohio State R., 42; Belknap v. Gleason, 11, Ct., 160; Haynes v. Pruyn, 7 Paige, 465; Crane v. Payne, 4, Cush, 483. Which *could not* be the case if the mortgage secured the note, nor if the note and mortgage were "*inseparable.*" So the *indebtedness itself* may be *separated* from the mortgage. Michles v. Townsend, 18, N. Y., 577. And a mortgage *debt* may be *extinguished* as a *personal* claim against the mortgagor, and the land remain liable for the amount of such debt. Tripp v. Vincent, 3, Barb. Ch., 614. So a *note* is extended by the extension of the *mortgage* which secures it, for the payment of the *debt* being extended, extends the *note*, whether evidenced by the extending of the

mortgage or in any other way. 1 Hilliard on Mortgages Chap. 17, Sec. 9. Flanders v. Barstow, 6, Shepley, 357.

And Judge Vanderburgh evidently confounded the *note* with the *debt* secured and evidenced by the note, regarding the terms *note* and *debt* as *synonymous*, and conceived that the reference in the condition of the mortgage to the payment of so much money according to the conditions of a *note*, necessarily made the *note* a part and portion of the *mortgage condition* instead of the *indebtedness* which is, so far as the *mortgage* is concerned, simply *evidenced by the note*. Smith v. Johns, 3, Gray, 519. As before remarked, the note and the mortgage are *separate and distinct securities for the same debt*. Either may be given up, destroyed or extinguished, and yet have no effect whatever on the other. They are *each of them without regard to the other* valid and binding until the *indebtedness*, *mutually* secured by *each* of them, is in some manner *extinguished* or barred, or a *tender* of it made which discharges the *lien*. The mortgage *refers* to the *note*, not because it secures it, but simply and singly for the information of those wishing and entitled to know, both the amount, interest and time of payment of the *indebtedness*, and also *the conditions of the mortgage itself*, the condition in the mortgage frequently being simply the payment of so much money according to the conditions of a note or bond between the same parties of the same date; referring to the note or bond, to guide those interested in knowing the *terms* of the payment of the *debt*, and of the *pledge for the debt*. But whether the instrument referred to in the mortgage, from which the desired information is to be obtained of the terms of the debt for which the property is mortgaged happens to be a note, or a bond, or any other kind of an instrument, can make no possible difference in the *character of the mortgage*. *It is under seal, non-negotiable, a chose in action*, and has *not a single feature in common with negotiable papers*. The *note* is a *simple* contract security for the payment of the debt. The *mortgage* is a *solemn* instrument *under seal* for the same purpose. The *note* is *negotiable;* the *mortgage* is *non*-negotiable. The *note* is for the benefit of the creditor to proceed against his debtor *personally* and *generally;* the *mortgage* to proceed in a manner *in rem* against the mortgaged property *specifically*. The *note* passes and is transferred in accordance with the law governing *commercial paper;* the *mortgage* passes subject to the law of *choses in action*.

4th. The assumption of Judge Vanderburgh that the decisions in New York, where the courts go to the full extent of holding that the assignee of a mortgage takes it subject to all the equities between the original parties, and to all payments made by the mortgagor to the mortgagee after the assignment of the mortgage by the mortgagee

until the mortgagor has *actual notice of the assignment*, were so made without *any qualification* when negotiable notes were secured by them, because nothing but *bonds (and never notes)* were ever used or known in connection with mortgages to secure debts in New York, *is erroneous*, as witness, among many others, the following cases of negotiable *notes:* Green v. Hart, 1, John., 580; Delabigarre v. Bush, 2, John., 490; Dunham v. Dey, 15, John., 555; Brinkerhoff v. Lansing, 4, John., Ch. 65; Robinson v. Williams, 22, N. Y., 380; Rogers v. Traders &c., 6, Paige, 583; Purser v. Anderson, 4, Edwards Ch., 17; Cobb v. Thornton, 8, How, 66; Slee v. Manhattan, 1, Paige, 48; Spencer v. Ayrault 6, Seld., 203; Tripp v. Vincent, 3, Barb., Chan., 614; Hill v. Beebe, 3, Kernan, 556; Bank &c. v. Finch, 3, Barb. Ch., 293; Butler v. Miller, 1 Comstock, 500; Vant Santwood's Plead., 194; 1 Hilliard on Mortgages, Chap. 11, Sec. 8; Dunham v. Day, 2, John. Ch., 182; Hayes v. Pruyn, 8, Paige, 465; 7 How., 401; 7 How., 134; Cahoon v. Bank of Utica, 3, Seld., 486; Thompson v. Blanchard, 4, Comstock, 303; Johnson v. Hart, 3, John. Cas., 329; Dunham v. Whitcomb, 21, N. Y., 131; Bush v. Lathrop, 22, N. Y., 535; Covell v. The Tradesmans Bank, 1, Paige, 131; Truscott v. King, 2, Seld., 159; Hayes v. Ward, 4, John. Ch., 124; Besley v. Lawrence, 11, Paige, 581; Jackson v. Bowen, 7, Cowen, 13; *James* v. *Johnson*, 6, John. Ch., 422. In this last case, in which the doctrine is unqualifiedly laid down, the mortgage was given with a *negotiable note.* And the *first three suits ever instituted in New York in regard to mortgages at all* were the cases of Johnson v. Hart, 3, John. Cases, 322; Green v. Hart, 1, John. 580; and Delabigarre v. Bush, 2, John., 490; *in each of which mortgages were given with negotiable notes* to secure debts, and all of which were decided in the highest court in New York. And the same doctrine has been again and again reiterated in New York without qualification to the very last case on the subject, Bush v. Lathrop, 22, N. Y., 535; where the mortgage was given to secure a *negotiable note*, up to which time the courts had passed upon the above *thirty cases* of negotiable notes secured by mortgage, besides *many others.* And in all the following States, in which the law is held the same as in New York, the assumption of the lower court of the absence of negotiable notes used in connection with mortgages to secure debts, is utterly at variance with the facts, as is shown by the following cases, among a *host* of others, where *negotiable notes* were used in connection with mortgages to secure debts:

Maine—Dwinal v. Perley, 32, Me., 197; Johnson v. Candage, 31, Me., 28.

Vermont—Belding v. Manley, 21, Vermont, 550; Langdon v. Keith, 9, Vermont, 299; Hayes v. Wood, 21, Vermont, 331.

Massachusetts—Warden v. Adams, 15, Mass., 233; Cutler v. Haven, 8, Pick., 490.

New Hampshire—Southerin v. Mendum, 5, N. H., 420; Bell v. Morse, 6, N. H., 210.

Connecticut—Dudley v. Caldwell, 19, Conn., 218; Bulkley v. Chapman, 9, Conn., 5.

Indiana—Burton v. Baxter, 7, Blackf., 297; Slaughter v. Foist, 4, Blackf., 539.

Illinois—McConnel v. Hodson, 2, Gilman, 640.

Rhode Island—Carpenter v. Carpenter, 6, R. I., 542.

Ohio—Paine v. French, 4, Ham., 318; Kramer v. Banks, 15, Ohio, 253.

Missouri—Labirge v. Chauvin, 2, Mo., 197; Anderson v. Baungartner, 27, Mo., 87.

Kentucky—Burdett v. Clay, 8, B. Munroe, 287; Waller v. Fate, 4, B. Munroe, 532.

Mississippi—Bank &c. v. Tarleton 23, Miss., 173; Henderson, v. Herrod, 10, Sm. & M., 631.

Tennessee—Greer v. Chester, 7, Humphry, 77; McDemot v. Bank &c., 9, Humphry, 123.

Alabama—Graham v. Newman, 21, Alabama, 497; Center v. P. & M. Bank, 22, Ala., 743.

Florida—Stewart v. Preston, 1, Branch, 10; Wilson v. Hayward, 2, Florida, 27.

Maryland—Bank &c. v. Whyte, 3, Md. Ch., 508; Union Bank v. Edwards, 1, Gill and John., 346.

Pennsylvania—Gossin v. Brown, 11, Penn., 527; Berger v. Heistro, 6, Wharton, 210.

New Jersey—Shillman v. Teeple, Saxton, 232.

Iowa—Wilkinson v. Daniels, 1, Iowa, 179.

Georgia—Hobby v. Pemberton, Dudley's R., 212.

Virginia—Farmers &c. v. Mutual &c., 3, Leigh, 69.

South Carolina—Euston v. Friday, 2, Richardson, 472, &c.

Arkansas—Gilbert v. Patterson, 18, Ark., 575.

United States Courts—Hoe v. U. States, 3, Cranch, 73; Shiras v. Caig, 7, Cranch, 34; Lawrence v. Tucker, 23, How., 14.

Texas—Henderson v. Pilgrim, 22, Texas, 464.

California—McMillan v. Richards, 9, Cal., 411.

In *all* of which except *New York* and *Pennsylvania*, promissory notes are believed to be the prevailing and almost exclusive instruments used in connection with mortgages to secure debts. And in all treatises and elementary works on the law in relation to mortgages, extant,

that are now considered of any weight or authority, promissory notes are spoken of and treated of as security for debts in connection with mortgages, infinitely more than all other instruments of every name and nature put together, as witness Hilliard on Mortgages, leading cases in equity, &c., &c. And it is believed that the first *case extant* that in the least *conflicts* with the law as laid down in New York as before set forth at the beginning of 2d point, no matter what might be the character of the personal security used in connection with the mortgage, is the case of Reeves v. Scully, Walkers (Mich.) Chan., 248. The *whole case, verbatim*, is as follows: "The bill was filed to foreclose a mortgage for $900, payable in one year, accompanied by a promissory note and payable to the mortgagee, Hawkins or order. Hawkins endorsed the note and assigned the mortgage to Reeves before the note was due. The mortgage and note were given to Hawkins to secure him in paying defendant's debts; and Hawkins, as appeared from the evidence, had at different times paid money for Scully to the amount of $788. Reeves was a *bona fide* holder of the note and mortgage and did not know the object for which they were given to Hawkins, when he took an assignment of them. The Chancellor: The decree must be entered for the amount of the note and mortgage. Reeves as bona fide endorsee of the note was not effected by the equities existing between Hawkins and Scully. It would have been otherwise if a bond instead of a note had been given with the mortgage."

It will be perceived that this was, apparently, simply the direction of the Chancellor to a Master in Chancery in an uncontested and exparte proceeding, foreclosing a mortgage, upon the spur of the moment, and evidently without any consideration or weighing of the subject whatever. And yet upon the strength of this *waif* this *uncontested, unargued, unconsidered, ill-advised, hasty, exparte* direction of an obscure Michigan Chancellor, opposed by the otherwise *unbroken current of all the authorities of all the courts in the world*, Judge Vanderburgh made the remarkable discovery that "*This has passed into and become elementary law;*" and the Michigan courts have adopted the position as correct law, and the Courts of Wisconsin have followed in the wake of the Michigan decisions.

And it is, to say the least, most extraordinary that all the Courts in the world (and there have been some supposed to be quite respectable Courts) should have so entirely overlooked and failed to discover for so many years the great *general rule* in regard to the assignments of mortgages, (for *negotiable notes* are and for many years have been the *general* personal security accompanying them in almost all of the States

of the Union,) and should have only succeeded in discovering and passing upon a very *inconsiderable exceptional* rule; and that it should be reserved for a Michigan Chancellor, entirely unknown to fame, and the District Court of Minnesota to make the astute discovery.

5th. The payment of the mortgage under which the defendant, Kate G. Carpenter claims, by John McKenzie, the mortgagor, to John Osborne, the mortgagee, in *good faith without any knowledge or notice of any assignment* of the mortgage, *extinguished the mortgage*, even though it had been previously assigned, in whose hands soever the same might be or subsequently come.

3 Leading Cases in Equity, 374, 375, 645, 646. *Collated Statutes of Minnesota, Chap.* 35, *Sec.* 28, *Page* 400. *The N. Y. Life and Trust Co. v. Smith*, 2, *Barb., Ch.*, 82; *Hanley v. Carroll*, 3, *Sandf., Ch.*, 301; Watkins v. Worthington, 2, Bland, (Md.) 509; Williams v. Sorrel, 4, Vesey, 389: *Mickles v. Townsend*, 18, N. Y., 575; Bush v. Lathrop, 22, N. Y., 535; the Niagara Bank v. Roosevelt, 9, Cowen, 409; Fitch v. Cotheal, 2, Sandf., Ch., 29; Mathews v. Wallwin, 4, Vesey, 118; Reed v. Marble, 10, Paige, 409; Vanderkemp v. Skelton, 11, Paige, 38; Hodgdon v. Naglee, 5, Watts and Serg., 217; the U. States v. Sturges, 1, Paine U. S. C. C., 525; McFarlane v. Griffith, 4, Wash., C. C. R., 585; Clute v. Robinson, 2, John., 595; James v. Morey, 2, Cowen, 320; 1 Hilliard on Mortgages, Chap. 18, Sec. 50, (a); Van Rensellaer v. Stafford, Hopkins Ch., R., 569; Ipswich Manufacturing Co. v. Story, 5, Met., 310; McGiven v. Wheelock, 7, Barb., 22; 9 Cowen, 316; Pouillon v. Martin, 1, Sandf. Ch., 569; Peabody v. Fenton, 3 Barb., Ch., 451; Sweet v. Van Wyck, 3, Barb., Ch., 647; Foster v. Beals, 21, N. Y., 251-2; Glidden v. Hunt, 24, Pick., 221; Clark v. Flint, 22, Pick., 231; Walcott v. Sullivan, 1, Edwards Ch., 402; Carew, v. Johnston, 2, Sch., and Lef., 296; Chadbourne v. Radcliffe, 30, Me., 351; Adams equity, 53-4; Brindle v. McIlvarin, 9, Serg. and Raw., 74; Ackla v. Ackla, 6, Barb, 228; Waring v. Smith, 2. Barb, Ch., 119; James v. Johnston, 6, John Ch., 417; 1 Hilliard on Real Property, Chap. 33, Secs. 2, 3 and 4; Mitchell v. Burnham, 44, Me., 303; Norton v. Rose, 2, Wash. R., 233; Beebe v. Bank of New York, 1, John., 529; Livingston v. Stubbs, 4. John., Ch., 693; Livingston v. Dean, 2, John., Ch., 479; Brashea v. West, 7, Peters, 608; McKenzie v. Rutherford, 1, Dev., and Bat., 14; Oliver v. Lowry, 2, Harrington, 46; Webster v. Wise, 1, Paige, 319; Jourdon v. Black, 2, Murphy, 30; Norrish v. Marshall, 5, Mad., 481; 1 Powell on Mortgages, 152; Douglass, R. 655; Williams v. Birbeck, 1, Hoffman's Ch., 359; Hubbard v. Turner, 2, McLean, 519. And if the payment by McKenzie to Orborne was made *before* the maturity of the note, it *extinguished the*

mortgage just the same as if made on the day of its maturity. Holman v. Bailey, 3, Met., 58; Plowden, 291; Co., Lit., 212; Burgaine v. Spurling Cro., Car., 284; McMillan v. Richards, 9, California, 411; Jones v. Quinnipiaik Bank, 29, Connecticut, 25.

And let us examine this position of Judge Vanderburgh, that when a mortgage is given to secure a debt evidenced by a *negotiable note*, it is *never* necessary, as against the mortgagor, to record the mortgage nor any assignment of the mortgage, *nor to give him any notice of the assignment*, and that he is *obliged at his peril* to keep run of *every transfer of the note* from one to another, and that all the risk and trouble is on him to ascertain and find out who is the *actual owner of the note;* and that there is the same necessity and *absolute obligation* of care, diligence, and *unerring certainty* in making a *tender* or *payment* to the party who *actually owns the note at the time, irrespective* of any *assignment*, or *notice of assignment* of the *mortgage*, in order to *free* the *land* from the *mortgage lien*, as to free the *mortgagor* from *personal* responsibility on the *note*.

Suppose that A to secure to B a loan of money gives him his negotiable note on time therefor and to secure the payment of it gives B his bond and mortgage. That subsequently before the maturity of the note B sells and endorses the note to C for value and in good faith and assigns the bond and mortgage to him. Subsequently to the making of the mortgage A conveys the mortgaged land with warranty D, to C does not record his assignment of the bond and mortgage and does not notify A of the assignment. When the note becomes due A being desirous to relieve the land from the lien of the mortgage, and to make good his warranty to D, calls on B to pay up the note and relieve and extinguish the mortgage, and declaring himself ready to pay up the note in full demands the production and delivery of the note, and bond and mortgage. B refuses to produce the note, bond and mortgage, or either of them, and will give no reason for the refusal. A examines the records to see if there has been any assignment of the mortgage, but there has been none recorded. He inquires of B and B refuses to tell him anything about it. He makes every effort to ascertain whether there has actually been any assignment of the note and bond and mortgage, or either of them, and can find no circumstance or thing that could cause belief or suspicion of any assignment, and fully believing that B is the actual holder and owner of the note and the bond and mortgage, he tenders to B the amount of the note and bond and mortgage in satisfaction of the same, and B accepts the money, but not having the note and bond and mortgage does not give them up. Now does any one doubt for a moment that

however it might be with the *note* that the *mortgage lien* was forever *extinguished* by the tender, payment and acceptance? For B was the *identical* individual he had *covenanted* to pay, or secure rather by a pledge of the mortgaged property, and appearing of record to be still the owner of the mortgage, and he having received no notice of any kind either actual or constructive of any assignment of the mortgage by B to any person, he was entitled to *presume* (Vanderkemp v. Skelton, 11, Paige, 38; The N. Y. Life and Turst Co. v. Smith, 2, Barb., Ch., 82; Hanley v. Carroll, 3, Sandf., Ch., 301; Williams v. Sorrell, 4. Vesey, 389; Watkins v. Worthington, 2, Bland., (Md.) 509; Reed v. Marble, 10, Paige, 409) that B was still the holder and owner of the bond and mortgage, and to tender him the amount due on them to discharge the mortgage lien.

And in order to make an *effective tender*, he was *obliged* to make it *unconditionally* and "*unaccompanied by any qualifying words* or DEMAND OF ANYTHING TO BE DONE BY THE PARTY TO WHOM THE TENDER WAS MADE BEYOND THE MERE RECEIPT OF THE MONEY TENDERED." Richardson v. Boston Chemical Lab. 9 Met. 52; Thayer v. Brackett, 12, Mass., 450; Loring v. Cook, 3, Pick., 48; Wood v. Hitchcock, 20, Wend., 47; Brooklin Bank v. DeGraw, 23, Wend., 342; Griffith v. Hodges, 1, Carr & Payne, 419; Peacock v. Dickinson, 2, Carr & Payne, 51 note; Strong v. Harvey, 3, Bing., 304; Ryder v. Townsend, 7, Dowl. and Ryl., 119; Glascott v. Day, 5, Esp., 48; Higham v. Bradley, Gow., 213; 2 Greenl. on evidence § 605; 1 Cranch, 321.

So that he *could not* make it a *condition precedent* or *concurrent*, if these authorities are correct, that the note and bond and mortgage or either of them should be delivered up or cancelled upon the tender, but was *obliged* to tender the money *absolutely* and *unconditionally* to make it good. But the *tender itself even if refused, instantly extinguished the mortgage*, though the *debt* against him *personally* would remain in full force. Kortright v. Cady, 21, N. Y., 366; Jackson v. Crafts, 18, John., 110; Edwards v. Farmers Fire Ins. Co., 21, Wend., 467; Arnet v. Post, 6, Hill, 65; Astor v. Hoit, 5, Wend., 617; Powell on Mortgages, 7, 8; 1 Hilliard on Mortgages, Chap. 1, Sec. 28, Page, 15-6; 1 Hilliard on Real Property, Chap. 28, Sec. 21; Edwards v. Fire Ins. &c., 26, Wend., 541; Swett v. Horn, 1, N. H., 332; Hill v. Robertson, 24, Mississippi, 368; Blanchard v. Kenton, 4, Bibb., (Ky.) 451; Darling v. Chapman, 14, Mass., 104; 3 John, Cas., 243; 12 John., 274; 6 Wend., 22; 6 Cowen, 728; Coggs v. Barnard, 2, Lord Raymond's R., 916; Merritt v. Lambert, 7, Paige, 344; and see Greenleaf's Cruise on Real Property, Title 15, Mortgage, Chap. 2, Sec. 39 and note citing numerous cases from a large number of the United States. And

it would be very strange indeed if the *tender* and *refusal* would extinguish the mortgage lien and the *tender* and *acceptance* would *not.*

Again suppose A having and owning the bond of B for $10,000 amply secured by mortgage on real estate borrows of C $100, and gives his negotiable note therefor to C, on time, and as collateral security for the payment thereof, assigns the said bond and mortgage against B to C. (And that the assigning of the bond and mortgage to secure the note is *giving a mortgage* to secure it. See 1 Hilliard on Mortgages, Chap. 18, Sec. 28; Slee v. Manhattan, 1 Paige, 48.) Subsequently C sells and indorses the note, before its maturity to D, who buys the same in good faith and for value, and takes an assignment of the bond and mortgage securing the same, but does not give either A or B notice of the assignment and does not record the assignment. Upon the day of the maturity of the note A calls on C to pay up his note and so informs C, and calls for and demands his note and the bond and mortgage of B, for $10,000, wishing to pay his debt and to get control and possession again of the bond and mortgage. C informs him that he has sold, endorsed, and transferred the note before maturity and also assigned the bond and mortgage to another person, but refuses to inform A who it was to whom he had sold the note and assigned the bond and mortgage. A examines carefully the records, inquires of B the obligor of the bond and mortgage to learn if he has had notice of the assignment by C, and cannot, by all his examinations, and the enquiries he can make, and from all the circumstances he can learn, asscertain any assignment of either note, bond, or mortgage to any one. And he then believing C to be the holder and owner of all the papers, note, bond and mortgage, and appearing by the records to be the present assignee of the bond and mortgage, tenders to C the amount due on the note, in order to regain possession and control of the bond and mortgage, and C accepts the money but refuses to deliver up the note and to re-assign the bond and mortgage to A. And thereupon A duly brings his bill in Equity against C, to compel a re-assignment of the bond and mortgage to himself, setting forth the above facts, and C files his bill of Interpleader between the claims of A, as above set forth, and those of D, who claims under a sale, endorsement and delivery of the note of A, before its maturity, in good faith and for value, and that he was the actual owner and holder of the note and bond and mortgage at the time of the tender of the amount thereof by A, and its acceptance by C. Now does any sane man doubt, that so far as the bond and mortgage are concerned, which were pledged as collateral to the note of A, that A is entitled to a re-assignment of them, and that all claim to hold them as collateral

for his note was *extinguished* by the *tender, payment, and acceptance* as above set forth?

Yet if the positions of Judge Vanderburgh are correct, that the moment the note is transferred the mortgage *eo instanti*, (and *this* proposition is correct in the *first instance*, so far as the *time* of its passing is concerned, and if followed up with due notice will remain so,) passes with it as an incident, free from all equities, and that the *note and the mortgage* or collateral security, are "*inseparable*," then the *note*, having beyond dispute, been transferred by an *indefeasible* title to D, the mortgage *must necessarily and inevitably have passed with it to D*, who must be still entitled to hold the bond and mortgage as security for the note, or the debt evidenced by the note. And there are, and *can be no possible or conceivable circumstances* by which the *bona fide* indorsee of the *note*, for value, before its maturity, *can* be deprived of the mortgage security, either by the acts or subsequent assignment of the mortgage by the mortgagee to a subsequent purchaser of the mortgage, for value, in good faith and without any notice, or by the payment or tender of the debt at its maturity by the mortgagor to the mortgagee in good faith and without any notice of its assignment, whether the assignment is ever recorded or not, whether the mortgage was ever actually assigned or not, or whether he ever gives notice to the mortgagor of the assignment or not. And the bond and the mortgage in this case, passing "*inseparably*" by the mere sale and delivery of the note from one to another, it would be *impossible* for A even to ascertain with certainty *to whom* to make the *tender* of the $100, to release his mortgage security, and he would thus be entirely at the mercy of the holders of his note, and would *forever* lose his $10,000 bond and mortgage for the paltry sum of $100, *unless* the holder of *his note* saw fit to *allow* him to pay it, and thus recover his bond and mortgage.

So that in all cases, where a mortgage chances to be given to secure a debt in connection with and evidenced by a negotiable promissory note, the Recording Act is of no effect whatever, either in the recording of the mortgage itself or the assignments thereof; and the simple fact that a mortgage is given in connection with a negotiable note, renders the Registry Law *nugatory* and *entirely useless*. And the mortgagor, or owner of the Equity of Redemption, *cannot rely* upon the *Records* to ascertain the state of the title to his own land, nor to learn to whom he must tender the mortgage money to redeem the land from the mortgage, but he must keep run of all the transfers and sales of the *note*, and at his peril make the *tender* and *payment* to *redeem* the land to the *very party* who at that very moment of time

actually owned the note, or both the *note* against him *personally*, and the *mortgage* against the land *specifically*, will remain undischarged. And thus would be *nullified* at a single stroke a very important portion of all our Registry Laws, and the titles to a very large portion of all the lands both in this State and in almost all the United States, would be instantly set AFLOAT; and all the *uncertainties* and *perplexities* would attend them, which are *inseparably connected* with the ownership of notes which pass by simple delivery from hand to hand and no man could tell the state of the title to his own land, nor however good his intention, or strong his desire, could clear the lien from his land by payment or tender to the right person, before the *actual owner* of the *note* saw fit to *let* him, by *disclosing himself*. And thus would be instantly opened one of the broadest flood-gates to hardship, perplexity, trouble and fraud which the Registry Act was expressly intended to close, and no man could remove the incumbrance from his land before the accumulations of the mortgage debt had swallowed up the entire value of the mortgaged property. It would be difficult to conceive of a decision on any subject which would *inevitably* result more mischievously and dangerously than this. But I apprehend this position is far from being law. The owner of the Equity of Redemption is *entitled* to *make his tender or payment* to discharge the mortgage from his land *to the person who appears of record to be the owner* of the *mortgage*, even though that person does *not* then actually own the mortgage, *but has assigned it*, but the assignment is not recorded, *and the apparent owner declares he has assigned it, but will not tell to whom.* Mitchell v. Burnham, 44 Me., 301; Noyes v. Clark, 7 Paige, 179; Hubbard v. Turner, 2 McLeon, 519; Hodgdon v. Naylor, 4 Watts & Serg., 426; Brindle v. McIlvarin, 9 Serg. & Raw., 74; Quinnebaug Bank v. French, 17 Conn., 135-6; Bolles v. Chauncey, 8 Conn., 391.

By the Laws of this State, too, (Collated Statutes, page 400, Sec. 28,) mortgages are unmistakeably put upon the exact footing of *choses in action*, in regard to the effect of the payment of them by the mortgagor to the mortgagee, without notice of any assignment. And so far as the mortgage is concerned, the mortgagor is under no obligation to search the records to know to whom to pay in order to relieve his premises from the lien of the mortgage, but he may pay it without question or inquiry to the person whom he *covenanted* to pay and to whom he gave the mortgage, and it will be good to discharge the mortgage lien unless he has been *actually notified* that it has been assigned, even though the assignment has been recorded. And our Recording Statutes make *no exception* in cases where mortgages are given to secure debts evidenced by *negotiable notes*, and unless they

are intended to apply to *such* mortgages they are *virtually useless*, because negotiable notes are *almost the only* instruments known in this State in connection with mortgages. And this fact was well known to the Legislature when they enacted the Registry Law on the subject, and it must be *presumed* that they *meant* it to apply to mortgages used with *negotiable notes* to secure debts; for otherwise they are chargeable with enacting a law which they themselves knew, at the very moment of enacting it, was simply a *farce and of no utility.*

And now suppose in this case that McKenzie, the mortgagor, on the day of the maturity of the note, for the sake of removing the lien from the premises, had without knowledge or notice of any assignment of the mortgage, Osborne also appearing of record to be still the owner and holder of the mortgage, *tendered* to John Osborne the mortgagee, the amount due thereon, and Osborne refused to receive it without assigning any reason. Does any one doubt that the *lien* of the *mortgage* on the *premises* would have been *forever extinguished*, even though Osborne had at that time actually assigned the mortgage to another person? Mitchell v. Burnham, 44 Me., 301; Noyes v. Clark, 7 Paige, 179; Kortright v. Cady, 21 N. Y., 366.

And is not the case at least *as strong* when the mortgagor actually *tenders* and *pays* the mortgage debt, in good faith and without notice as when he simply *tenders* it and it is *refused?* Does not the assignee, by laches, in not notifying the mortgagor of the assignment to himself, as required by law, deprive himself of all just grounds of complaint at the loss of the mortgage security?

6th. Even if the 1st mortgage were *admitted* to be still unextinguished, it being *admittted by the pleadings* that when the Plaintiff took the assignment of his mortgage of John Osborne, the mortgagee, Osborne claimed to be the owner of both the mortgages, (i. e., Plaintiff's and Defendants',) *and appeared to be so by the records*, and that Plaintiff, after the most rigid scrutiny and search, failed to elicit a single circumstance or thing calculated to cast the least doubt upon such claim, and believing said Osborne actually owned both of said mortgages and the notes secured thereby, and being deceived by the *laches of Defendant* in making the assignment of the mortgage to her a *matter of record*, and induced thereby to loan money to said Osborne under the belief that Plaintiff's claim would be valid, under the assignment of said Osborne to both said mortgages, the assignment by the said Osborne to Plaintiff, whereby he assigned "all my right, title, claim, interest and demand in and to said mortgaged premises" was virtually a *deed*, and operated to assign *both* of said mortgages to the plaintiff to the extent of Osborne's apparent title. Plaintiff's as-

signment being admitted to be the first assignment recorded. Olmstead v. Elder, 2 Sandf., R. 325; Johnson v. Bowen, 7 Cowen, 13; Lawrence v. Stratton, 6 Cush., 163; Given v. Doe, 7 Blackf., 210; Dockray v. Noble, 8 Greenl., 278; 1 Hilliard on Mortgages, Chap. 18, Sec. 3; Hunt v. Hunt, 14 Pick., 374; Freeman v. McGraw, 15 Pick., 82; Baker v. Barker, 4 Pick., 505; Pratt v. Skolfield, 45 Me., 390; Crooker v. Jewell, 31 Me., 306; Collamer v. Langdon, 29 Vermont, 32; 1 Washburne on Real Property, 520. *Or, at the least*, it made Plaintiff's mortgage the *first lien* on said premises, and *postponed* and made *second and subservient* the mortgage under which the Defendant, Kate G. Carpenter, claims. *Van Rensellaer v. Stafford*, 1 *Hopkins, Ch.*, 572; 3 Leading Cases in Equity, 374 and 647; Bank of England v. Tarleton, 1 Cushman, 173; Wright v. Parker, 2 Aiken, (Vt.) R., 212; Cullum v. Irwin, 9 Alabama, 458; *Bush v. Lathrop*, 22 N. Y., 535; 1 Washburn on Real Property, 524; Bryant v. Damon, 6 Gray, 564; Bank of England v. Tarleton, 23 Miss., 178; Langdon v. Keith, 9 Vt., 229; Mechanics Bank v. Bank of Niagara, 9 Wend., 410; Chase v. Woodbury, 6 Cush., 147.

And, in short, the decision of Judge Vanderbugh in this case *inevitably leads to, involves, and includes the following absurdities*, viz: that *while on the one hand it ingrafts a new, anomalous, and incompatible scion on the trunk of commercial law, it on the other uproots and destroys the whole of the settled rules of the transfers of negotiable paper. And at the same time it nullifies a large portion of all the Registry Laws*, overturns the settled law of tender to discharge mortgage liens, *and utterly ignores the well settled, unbroken current of all the authorities of nearly all the Courts in the world.*

There is no doubt of the correctness of the general proposition that *in equity*, upon the transfer of the note the mortgage passes with it *as an incident of the debt;* and it passes in precisely the same way where it is a *bond* that is given as the personal security and is transferred. But *at Law*, strictly and *accurately* speaking, the assignee acquires *no legal* rights whatever to the *mortgage* by such assignment and transfer of the note. Anderson v. Baumgartner, 27 Missouri, 87. It does not *actually transfer* nor *assign* the *mortgage itself*, but simply operates as an *equitable assignment* to the assignee of whatever value or security the mortgage represented in the hands of the assignor. And how can a party, who, strictly speaking, has no claim whatever *at Law*, and who is *not in possession* of property, prevail in a *Court of Equity* against a party *in possession*, and who has *at least equal* equities?

And in *all cases*, the *mortgage*, whether assigned or not, passes *as a chose in action*, being in all cases a *specialty*. And so far as the *char-*

acter of the mortgage is concerned, *it is precisely the same as though there were no note at all given* SEPARATELY, *but an exact copy of one inserted in* THE CONDITION OF THE MORTGAGE. And if that were the case, and no note at all were given separately from the mortgage, would any one doubt for a moment that the mortgage would pass *as a chose in action* and subject to all equities between the original parties until notice of assignment?

So far as this State is concerned, this point is *res non judicata*. And it is of very great importance that a decision, which so unmistakebly involves so many vital interests and principles inseparably connected with well settled principles of law and with the welfare of the State, should be, as nearly as possible, mathematically correct. The position of the Michigan and Wisconsin Courts may at the first glance to a casual and superficial observer appear quite plausible; but the moment the tests of strict legal logic and legal analysis are applied to it, its utter fallacy and absurdity are made most glaringly apparent. And it is a matter of grave surprise how any Court, with the light and logic of such decisions extant as *Stearns v. Wrisley*, 30 *Vt.*, 661; *Henderson v. Pilgrim*, 22 *Texas*, 477; *Mickles v. Townsend*, 18 *N. Y.*, 575; *Bush v. Lathrop*, 22 *N. Y.*, 535; *New York Life and Trust Co. v. Smith*, 2 *Barb. Ch.*, 82; *Hanley v. Carroll*, 3 *Sandf. Ch.*, 301; Williams v. Sorrell, 4 Vesey, 389; Watkins v. Worthington, 2 Bland., (Md.) 509; *James v. Johnson*, 6 *John. Ch.*, 432; *Jones v. Qunnipiack Bank*, 29 *Conn.*, 25; Bolds v. Chauncey, 8 Conn., 390; Minnesota Collated Statutes, page 400, Sec. 28; McMillan v. Richards, 9 California, 411; *Eaton v. Whitney*, 3 *Pick.*, 488; *Holman v. Bailey*, 3 *Met.*, 58; *Young v. Miller*, 6 *Gray*, 152; *Mitchell v. Burnham*, 44 *Me.*, 301; Aiken v. Kilburn, 27 Me., 266; Hodgdon v. Naglee, 5 Watts & Serg., 217; and an almost innumerable host of other decisions to the same effect in nearly all the Courts in the world, should either have been ignorant of their existence or have doubted the correctness of the position that mortgages are always and *in all cases, choses in action*, within Common Law definition of the term, and pass subject to the equities between the original parties until notice of assignment.

7th. Plaintiff having taken an assignment of the mortgage under which he claims for value, of the mortgagee without notice, actual or constructive of any previous assignment, after using extraordinary dilligence to discover if there were any and could find none, all of which is admitted by the pleadings, he will hold it as against Isaac Crowe, and all other persons. 3 Leading Cases in Cases in Equity, 646; Beebe v. Bank of New York, 1 John., 551, 552, 561-2; Williamson v. Brown, 15 N. Y., 354; James v. Johnson, 6 John., Ch., 432;

Collated Statutes of Minnesota, page 400, Secs. 24, 28, 29, and 30.

8th. The Jury having found that the first note and mortgage were paid by the mortgagor to the mortgagee; but not finding at what time the same were paid, the *law presumes* that the payment was made on the day of the maturity of the note. 1 Cowen & Hill's Notes to Phillips on Evidence, page 369, 2d Edition; Cooke v. Soltan, 2 Simons & Stewart, 154; Emery v. Graycock, 6 Maddock's R., 54; Noell v. Bewley, 3 Simons R., 103; Jackson v. Stackhouse, 1 Cowen, 122; Wilson v. Wetherby, Bull Nisi Prius, 110.

L. M. STEWART, Pl'ff's Att'y.

POINTS AND AUTHORITIES OF APPELLEES.

D. A. SECOMBE, Attorney for Appellees.

I. The allegation in the complaint, of the payment of the first note and mortgage, (com. folios 14 and 15,) is not sustained by the finding of the Jury.

1st. Because the alleged time is not found. The finding of the jury leaves the payment found by them entirely indefinite as to time. There is nothing to show but that the payment might have been made even after the institution of this action.

There certainly can be no presumption *in* favor of the plaintiff, as to the time, which shall contradict the allegation of the complaint on that point.

If the indefiniteness of the finding can be aided at all to favor the plaintiff, it must be by a presumption in accordance with the allegation; that is, that the payment was made before the assignment to Eastman.

2d. Because the jury find merely the payment of *the amount* of the note and mortgage, and not the *note and mortgage.*

It appears by the pleadings and the finding of the jury, that, at the time of the transfer of the *first* note and mortgage from Osborne to Eastman, the same were nine months short of maturity, while, at the same time, the second note and mortgage were more than nine months over due, and were for an amount greater than the first.

Now in the absence of any special application of the payment, by the parties thereto, the law will apply it, first to the indebtedness, if any, which was at the time due, or secondly, if neither was at that time due, then to the one first to become due, which in either event, in this case would be the *second* note and mortgage. Story on Contracts, §878.

II. A mortgage given to secure a negotiable note is a mere incident thereto, cannot be separated therefrom, and is to be considered as effected by the same equities therewith. 3 Johns. Cases, 322; 1

Johns. R., 580; 4 ib., 41; Vol. 1 Hill. on Mort., Chap. 18, Sec. 49th; Walk. Ch. R., (Mich.) 248; 1 Cooley, 519; 3 Chand., 94; 4 Chand., 153; 9 Wis., 503; 11 Wis., 353.

III. The first note and mortgage having been transferred by Osborne to Eastman before maturity, could not be effected by any payment made to Osborne, without notice to Eastman, either before or after the transfer.

IV. It appears by the pleadings and the finding of the jury that the plaintiff, at the time of the commencement of this action, was not the owner of the second note and mortgage, to such an extent as to entitle him to maintain this action.

V. The plaintiff being the assignee of Osborne, after maturity, who was also Eastman's assignor, can have no greater equities against Eastman or his assignees than could Osborne have had.

D. A. SECOMBE, Att'y for Appellees.

By the Court—FLANDRAU, J.—On the 17th of December, 1855, John McKenzie gave a mortgage on the premises in question, to John Osborne, for $207, payable in three years, with interest at thirty per cent. per annum, which mortgage was to secure a negotiable promissory note of same date and amount, and due at the same time. The mortgage was recorded February 19, 1856.

On the 4th day of June, 1856, said McKenzie executed to said Osborne a second mortgage on the same premises, to secure the payment of another promissory note for $370, due in one year, with interest at twenty-five per cent. per annum.

On the 17th of March, 1858, said Osborne assigned the first note and mortgage to William W. Eastman, and Eastman, on the 23d day of May, 1861, assigned the same to Kate G. Carpenter, both of which assignments were recorded on the 23d of May, 1861.

On the 11th day of June, 1859, prior to the recording of the assignment of the first mortgage, the Plaintiff, without any knowledge of such assignment, and supposing that the first note and mortgage belonged to Osborne, made a loan to Osborne of $219.50, and took as security therefor an assignment of the second note and mortgage, which assignment was duly recorded.

The jury by their special verdict, find that "John McKenzie paid to John Osborne the amount of the first note and mortgage mentioned in the complaint, and purporting to be assigned to W. W. Eastman, March 17, 1858, in good faith and without any knowledge of any assignment or sale thereof by said Osborne, the mortgagee," and that "they have no evidence of the time at which said payment was made."

As the verdict of the jury leaves the time of the payment of the above sum uncertain, and as the counsel for the Defendants makes a question as to whether it was a general payment without special application to the first note and mortgage, or was intended to be so applied, we will settle these two points here. The jury, it is true, find that McKenzie paid to Osborne *the amount* of the first note and mortgage, and not that he paid the note and mortgage, or the debt secur-

ed by them, but taking the two circumstances together, that the sum paid was exactly the amount of that debt, and that the jury find that he paid it in good faith and without any knowledge of any assignment or sale of the first note and mortgage, we think the fair interpretation of the verdict is, that the payment was made upon that debt, and not generally upon both. The time of the payment must be governed by the legal presumption that when it is uncertain whether such a payment is made before, on, or after the due day of the debt, it will be taken to have been made on the day. 3 *Cow. & Hill's Notes to Phillip's Ev.*, 3d *Ed.*, *p.* 500, *and cases there cited; Powell's Law of Mortgages*, 3d *Ed.*, *p.* 55. The mortgage was therefore paid on the 20th day of December, 1858. As between the mortgagor and the assignee of the mortgage, this payment extinguished the mortgage, unless that instrument partook of the negotiable qualities of the note for which it stood as collateral security, and this result would follow, even if the assignment had been recorded, provided the mortgagor had no actual knowledge of the assignment at the time of making the payment. The statutes of this State, although they place assignments of mortgages on the same footing as conveyances of real estate, (*Comp. Stat.* 405, *sec.* 63), and the assignees of mortgages upon the same footing as purchasers of real estate, (*Comp. Stat.* 405, *sec.* 62), in respect to the effect of recording or omitting to record such assignments, they make a special exception in favor of mortgagors, by providing in *sec.* 28, *p.* 400, *of the compiled statutes* that "the recording of an assignment of a mortgage, shall not, in itself, be deemed notice of such assignment to the mortgagor, his heirs or personal representatives, so as to invalidate any payments made by them, or either of them to the mortgagee." It seems, therefore, that a mortgagor may always pay his mortgage debt to the mortgagee, whether the mortgage has been assigned or not, if he pays in good faith and without knowledge of the assignment, and also that an assignee to be fully protected against such payments, must do more than simply place his assignments on record, he must bring home to the mortgagor actual notice that the assignment has been made. It will be observed that this provision of statute is general in its application to mortgages, making no exception in regard to such as are collateral to negotiable paper.

It is claimed, however, by the counsel for the Defendants, that this mortgage was given to secure the note, is a mere incident to it, cannot be separated from it, and is to be affected by all equities that would influence it. The cases to which we are cited by the counsel, from the New York Courts, (3 *John. Cases*, 322; 1 *John. R.*, 580, 4; *ib.*

41;) establish that the mortgage is an incident to the *debt secured*, and will pass to whomsoever receives a transfer of the debt, or become extinguised by the satisfaction of the debt, but they go no farther, and we fully agree with the decisions in that respect, regarding as we do, the law as there stated to have been long settled. Mortgages are not regarded as conveyances of land within the statute of frauds, so as to require a reconveyance or release to divest the title of the mortgagee; any act, even forgiving the debt by parol, will discharge the mortgage. *Powell on Mort.*, 3*d Ed.*, 54.

The cases cited by the counsel, from Michigan and Wisconsin, do go to the full extent claimed by him, and hold that a mortgage given to secure a negotiable promissory note partakes of the privileges and immunities of commercial paper, so far as to exempt it from all equities existing between the mortgagor and mortgagee, if with the note it is transferred to a *bona fide* holder before due. *Walk. ch.* 248; 1 *Cooley*, 519; 3 *Chand.*, 94; 4 *Chand.*, 153; 9 *Wis.*, 503; 11 *Wis.*, 353; and *Mr. Hilliard*, in his work on *Mortgages*, *vol.* 1, *p.* 526, *sec.* 49, *a*, says, on the authority of *Reeves vs. Scully*, *Walk.*, *ch.* 248, "If the mortgage is given to secure a negotiable note, and both are assigned before maturity to a *bona fide* indorsee, he takes clear of any equities between the original parties." These Wisconsin and Michigan cases, the one being based upon the authority of the other, were evidently decided without much investigation of the question, and so far as we have been able to learn, from a pretty full examination, both upon principle and authority, aided by the very elaborate and thorough brief of the counsel for the Appellant, stand alone, and Mr. Hilliard having adopted the Michigan rule in his text, without comment or further authority, does not add anything to its weight.

The rule as we collect it from the books, is, that where a debt is secured by a mortgage on real estate, and also by negotiable promissory note, the mortgage is a *chose in action* as between the mortgagor and any subsequent assignee, and is taken subject to the state of accounts between the mortgagor and mortgagee, at the time of the assignment, and to all payments made by the mortgagor to the mortgagee at any time before actual notice of the assignment. The mortgage is an incident to the debt, and whoever owns the latter is entitled to the benefit of the former to enforce payment, but he cannot rely on the privileged character of the note to ensure him the advantage of the mortgage. He must be vigilant in bringing home to the mortgagor the fact of the change of ownership in the mortgage. If the mortgagor pays the mortgage to the mortgagee after it has been assigned, without notice of the assignment, the lien is extinguished,

and the land cleared of the incumbrance, and the mortgagee becomes a trustee of the sum paid for the benefit of the owner of the debt. Any other rule would destroy the entire effect and force of the registry acts relative to the assignments of mortgages, because if such instruments can partake of the character of negotiable paper, no restraint upon their free transmission from hand to hand before maturity can be tolerated compatibly with the privileges enjoyed by such securities, but we see that the registry laws, without distinction, do impose the same disabilities upon mortgages and upon assignments of mortgages, as upon other conveyances of real estate, with the exception above noted in favor of mortgagors, which subjects them to even greater disabilities than ordinary conveyances. It appears to us that we would be making a startling innovation upon the long settled policy of the laws of real estate, should we concede to any security that carries with it an interest in, or lien upon lands, the volatile and transitory attributes of a mere promise to pay money. Such a doctrine is inherently vicious, and would tend very much to unsettle titles; we cannot agree to it. Numerous authorities are collected upon this point in the brief of the Plaintiff to which we refer in support of our views.

Johnson, the Plaintiff, holding the second mortgage, is entitled to the benefit of payments made upon the first. *Whitacre et als. v. Fuller et als.*, 5 *Minn. R.*, 508.

The judgment of the District Court is reversed, and judgment ordered for the Plaintiff according to the prayer of his complaint.